CIMB ISLAMIC BANK BHD

v.

LCL CORPORATION BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D4-22A-457-2010]
9 JUNE 2011

BANKING: *Banks and banking business - Islamic banking - Summary judgment application for amount owed under Bai Bithaman Ajil Facility - Triable issues - Whether raised - Rules of High Court 1980, O. 14*

The plaintiff applied for summary judgment against the defendants under O. 14 of the Rules of the High Court 1980 for the sum of RM54,442,744.08 owing under a term financing facility granted to the first defendant under the concept of Bai Bithaman Ajil ('BBA Facility'). In its application, the plaintiff also sought ta'widh (compensation) and costs. The second defendant, who was the director of the first defendant, provided the security for the facility. He executed a Memorandum of Deposit of Securities ('MOD') consisting of shares in favour of the plaintiff. The amount claimed by the plaintiff was the shortfall after the plaintiff sold off the shares under the MOD. Prior to the BBA Facility, the plaintiff had granted the first defendant another BBA Facility ('the first facility') to refinance a Short Term Advance Facility granted by CIMB Bank Berhad. In opposing the O. 14 application, the defendants argued that no monies were ever disbursed under the BBA Facility. They said the BBA Facility was a sham to disguise a rescheduling of repayments under the First Facility as the First Facility had not been terminated and the same asset was utilized in both BBA transactions. The defendants said (i) the BBA Facility was null and void (ii) the amount claimed was wrong and inaccurate (iii) the defendants were entitled for ibra' (release from debt) (iv) the calculation on ta'widh was wrong and (v) the plaintiff had no right to claim against the second defendant.

Held (allowing the summary judgment application with costs):

(1) The First Facility and the BBA Facility were two different transactions. Nothing in the BBA Facility legal documentation showed that it was for the purpose of rescheduling

repayments under the First Facility. The BBA Facility was not for rescheduling but for refinancing the First Facility (paras 10, 12 & 27).

(2) The parties had voluntarily agreed to be bound by the terms and conditions of the specific agreements they had executed. In the absence of any legal factor that could vitiate a contract, the court had to uphold the transactions and contracts entered into by both parties (paras 57 & 25)

(3) There was no evidence to doubt the accuracy of the certificate of indebtedness relied on by the plaintiff to substantiate its claim. (para 34)

(4) On a plain reading of the letter of offer, early settlement only referred to a situation where the first defendant made early payment of the BBA Facility before the end of the tenure without compulsion. This was not so in the defendants' case as until to date there was no effort to settle the outstanding. The plaintiff was therefore under no obligation or duty to grant ibra' to the defendants (paras 43 & 44)

Case(s) referred to:

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

John Wallingford v. The Directors & C of The Mutual Society [1880] 5 AC 685 (HL) ***(refd)***

Majlis Amanah Rakyat v. Bass Bin Lai [2009] 2 CLJ 433 HC ***(refd)***

Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA ***(refd)***

Polygram Records Sdn Bhd v. Hillary Ang & Ors & Anor [1994] 3 CLJ 806 HC ***(refd)***

Legislation referred to:

Islamic Banking Act 1983, s. 2

Rules of the High Court 1980, O. 14

Other source(s) referred to:

Al-Bukhari, *Sahih*, vol XIII, Kitab al-shurut, al-Mat ba'ah al Masriyah, 1934, p 289

Assoc Prof Dr Engku Rabiah *Bay Al-Inah and Tawarruq* [2008] CERT Publication, p 136

Dr Ali Muhyi al-Din al-Qurah Daghi, *The Problem of Delayed Debts And Their Guarantees in Islamic Banks: A Shariah Study On Compensation For Deferred Loans, Contemporary Issues in Islamic Finance*: Deliberation at the International Shariah Scholars Dialogue 2006, Central Bank of Malaysia, p 130

Dr Abd al-Rahman Salih al-Atram, *Ibra' In Islamic Finance: Adaptation And Application, Contemporary Issues in Islamic Finance*: Deliberation at the International Shariah Scholars Dialogue 2006, Central Bank of Malaysia, p 294

Dr Wahbah Al-Zuhayli, *Al-Fiqh Al-'Islami wa 'Adillatuh*, vol 2, 2002, Dar Ad-Fikr, Damascus, p 147

Halsbury's Laws of Malaysia, vol 1, Civil Procedure, p 62

Mufti Muhammad Taqi Usmani, *An Introduction to Islamic Finance*, Kluwer Law International, Hague, 2002, p 67

Muhammad Ayub, *Understanding Islamic Finance*, John Wiley & Sons, Ltd, p 135

Prof Madya Dr Asyraf Wajdi Dusuki & Ors, Implimentasi Ibra' Dalam Produk Berasaskan Harga Tangguh Dalam Sistem Perbankan Islam: Analisis Dari Perspektif Operasi Perbankan Dan Maqasid Syariah, ISRA Research Paper (No. 16/2010), pp 1-3

Resolusi Syariah Dalam Kewangan Islam, 2010, p 123

Shariah Resolutions in Islamic Finance, Bank Negara Malaysia, 2007, pp 34, 40, 41, 66-71, 88

Wizarah al-Awqaf wa al-Syu'un al-Islamiah, Al-Mausu'ah Al-Fiqhiyyah, 1993, vol. 42, p 120

For the plaintiff - HL Chan; M/s Azim Tunku Farik & Wong
For the defendants - BE Teh; M/s Teh & Assocs

Reported by Ashok Kumar

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This judgment is in respect of the plaintiff's application for summary judgment against the defendants pursuant to O. 14 of the Rules of the High Court, 1980 (encl. 14).

[2] The application is for recovery of the sum due under the RM48,500,000 Term Financing-i facility under the concept of Bai Bithaman Ajil ("BBA Facility"), granted to the 1st defendant

which, as at 18 May 2010, amounting to RM54,442,744.08. Apart from the said claim, the plaintiff also sought for ta'widh and costs.

[3] In deciding whether to grant summary judgment, this court has to consider whether there is any triable issue in this case which warrants a full blown trial. For that purpose, I am mindful of the Supreme Court's judgment in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 which emphasizes that in an application under O. 14, this court has to be satisfied that the defence has not only raised an issue, but also that the said issue is triable. Where the assertion, denial or dispute made by parties is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, this court has to reject such assertion or denial by rendering the issues raised not triable. Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, this court should exercise its duty under O. 14 even the said question is at first blush of some complexity and therefore takes a little longer to understand.

Factual Background

[4] The plaintiff is an Islamic bank licensed under the Islamic Banking Act, 1983 ("IBA 1983"). The 1st defendant is the customer of the plaintiff by virtue of the BBA Facility granted to them and the 2nd defendant is the securities provider by reason of the Memorandum of Deposit of Securities (third party) dated 24 April 2009 ("MOD").

[5] The dispute arises out of the disinclination on the part of the defendants to pay the amount outstanding under the BBA Facility despite of notices of demand dated 20 May 2010 issued to them. This outstanding is the shortfall after the Plaintiff have exercised their rights under the MOD by selling the shares belong to the 2nd defendant on 11 December 2009 at RM3,666,822.80.

Arguments By Learned Counsel For Plaintiff And Defendants

[6] In response to the instant application, learned counsel for the defendants argued on five main issues: (a) that the BBA Facility is null and void, (b) that the amount claimed is wrong and

inaccurate, (c) that the defendants are entitled for ibra', (d) that the calculation on ta'widh is wrong, and (e) that the plaintiff has no right to claim against the 2nd defendant. That being the case, it was submitted that this is not a proper case for summary application.

[7] In countering the arguments, learned counsel for the plaintiff denied the allegations put forth by the defendants and submitted that they are bound by the agreements that have been duly perfected. In the absence of any manifest error on the statement of account, this court is obliged to hold that the said statement is the final and conclusive proof of indebtedness of the defendants to the plaintiff.

[8] I shall now proceed to examine and consider each issue relied by the defendants in resisting this application in turn.

Finding Of The Court

The Validity Of BBA Facility

[9] In the instant case, the defendants wish this court to believe that the transaction between the plaintiff and the 1st defendant is not a *bona fide* sale under the BBA concept but it is rather a rescheduling of the repayments under the Bai Bithaman Ajil Facility granted in the year 2008 (1st BBA Facility"). Hence, the imposition of a higher sale price by the plaintiff in the BBA Facility was in contravention of the resolution no: 96 passed by the Shariah Advisory Council of Bank Negara Malaysia ("SAC"). For this assertion, reliance was placed on the antecedents of the BBA Facility sued upon, the allegation that no monies were ever disbursed under the BBA Facility, the fact that there is no termination in respect of the 1st BBA facility and the utilization of the same asset in the BBA transaction.

[10] The stand taken on behalf of the plaintiff is simple. The 1st BBA transaction and the one before this court are two different transactions. Placing reliance on the celebrated Court of Appeal's decision in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22, learned counsel for the Plaintiff concluded by saying that as the defendants had voluntarily agreed to be bound by the terms of the agreements and letters of hibah collectively for the BBA Facility and had received the benefits there under, the issue raised is not genuine for a full trial.

[11] The court finds considerable force in the submission of learned counsel for the plaintiff.

[12] Concededly, the relationship between the plaintiff and the defendants started when the 1st defendant was granted with the 1st BBA Facility in 2007 to refinance the Short Term Advance Facility of RM50,000,000 from CIMB Bank Berhad. Then, upon application by the 1st defendant, the plaintiff has granted the BBA Facility the purpose of which to refinance the existing facility of RM48,500,000 (Account No. 1404-0000207-40-7). This court notes that there is nothing in the BBA Facility Legal Documentations indicates that the said facility is for rescheduling the repayment under the 1st BBA Facility. On this basis alone, the contention by the defendant that the BBA Facility is in fact for rescheduling purposes must fail.

[13] In order to facilitate the aforesaid objective, parties have voluntarily agreed to embark into sale transactions based on Bai Bithaman Ajil principle (BBA) which involve 16,000,000 units of the 2nd defendant's shares in the 1st defendant's company ("the asset").

[14] BBA is a sale contract in which the payment of the price is deferred and payable at a certain particular time in the future. In fact, it can be implicated in any sale contract which includes Bai' Al Inah except for salam contract, as the payment of salam must be settled in full at the outset of the contract. From this, it is obvious that BBA is not a kind of sale; rather it refers to the manner of payment *via* a deferred payment basis, be it a lump sum payment or installments. However, modern practices in banking and finance have somewhat modified this situation. BBA has been referred to as the sale and purchase transaction for the financing of an asset on a deferred and installment basis with a pre agreed payment period (see INCEIF CIFP Module on Applied Shariah In Financial Transactions, p. 69).

[15] Concerning a contract on BBA, Raus Sharif JCA (as he then was) in *Bank Islam Malaysia Bhd v. Lim Kok Hoe (supra)* had this to say:

> [14] A BBA contract is a financial instrument in Islamic banking. It is the most common form of transaction being used in Islamic banking in this country. Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's

customers to purchase and own properties or assets. It involves two distinct contracts, one a Property Purchase Agreement and also a Property Sale Agreement.

[15] In a typical BBA contract, the customer will first sell the property or asset to the bank under the Property Purchase Agreement. The bank's purchase price would be the amount required by the customer. That sum is called the facility amount or the financing amount. It is also described as the bank's purchase price.

[16] In BBA or general sale contract, it is trite that what is not owned by the seller cannot be sold. Thus, for a valid sale contract the subject of the sale must be in the ownership of the seller at the time of sale (see *Muhammad Ayub, Understanding Islamic Finance, John Wiley & Sons, Ltd*, p. 135 and Mufti Muhammad Taqi Usmani, *An Introduction to Islamic Finance*, Kluwer Law International, Hague, 2002, p. 67).

[17] According to Wahbah al-Zuhayli, ownership is "a specified right on something that prevents other people from interfering with due to the fact that its owner has absolute right to utilize it provided that there is no shariah restriction". Another Muslim scholar, Al-Sayuti defined ownership as "a legal interest vested in a thing itself or in its usufruct, giving its beneficiary the right to profit from it or receive compensation according to the attribution which he possesses". (See Dr Wahbah Al-Zuhayli, "Al-Fiqh Al-'Islami wa 'Adillatuh, vol. 2, 2002, Dar Ad-Fikr, Damascus, p. 147).

[18] Being an Islamic bank, the plaintiff must carry Islamic banking business and operations which do not involve any element disapproved by the Religion of Islam (see s. 2 of IBA 1983). Being that so, in the light of the said principle, letter of hibah (or letter of gift) was used to fulfil the said condition to enable the 1st defendant to be the owner of the asset.

[19] Hibah means giving away the ownership of an asset with immediate effect without any return. It is a unilateral benevolent contract in which a party transfers the ownership of an asset to a person without any consideration during the lifetime of the giver (see Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *Al-Mausu'ah Al-Fiqhiyyah*, 1993, v. 42, p. 120 and *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, p. 71).

[20] In this case, the parties agreed to enter into the following four sets of agreements with the plaintiff one after another, on the same date and in respect of the same above mentioned asset:

(i) the letter of hibah dated 24 April 2009 from the 2nd defendant who voluntarily gave the asset to the 1st defendant, the asset purchase agreement dated 24 April 2009 (asset purchase agreement (1)") where the 1st defendant sold to the plaintiff the asset at RM12,125,000 ("purchase price"). The plaintiff then sold back the same asset to the 1st defendant at RM16,087,500 ("sale price") the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ("asset sale agreement (1)"). Afterward, by another letter of hibah dated 24 April 2009, the 1st defendant conveyed, by way of gift to the 2nd defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2A in encl. 15. Enclosure 15 is an affidavit affirmed by Eddy Chong Hock Chuan on 18 August 2010;

(ii) the letter of hibah dated 24 April 2009 from the 2nd defendant who voluntarily gave the asset to the 1st defendant, the asset purchase agreement dated 24 April 2009 (asset purchase agreement (2)") where the 1st defendant sold to the plaintiff the asset at RM12,125,000 ("purchase price"). The plaintiff then sold back the same asset to the 1st defendant at RM16,087,500 ("sale price") the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ("asset sale agreement (2)"). Afterward, by another letter of hibah dated 24 April 2009, the 1st defendant conveyed, by way of gift to the 2nd defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2B in encl. 15;

(iii) the letter of hibah dated 24 April 2009 from the 2nd defendant who voluntarily gave the asset to the 1st defendant, the asset purchase agreement dated 24 April 2009 ("asset purchase agreement (3)") where the 1st defendant sold to the plaintiff the asset at RM12,125,000 ("purchase price"). The plaintiff then sold back the same asset to the 1st defendant at RM16,087,500 ("sale price") the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ("asset sale agreement (3)"). Afterward, by another letter of hibah dated 24 April 2009, the 1st defendant

conveyed, by way of gift to the 2nd defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2C in encl. 15; and

(iv) the letter of hibah dated 24 April 2009 from the 2nd defendant who voluntarily gave the asset to the 1st defendant, the asset purchase agreement dated 24 April 2009 ("asset purchase agreement (4)") where the 1st defendant sold to the plaintiff the asset at RM12,125,000 ("purchase price"). The plaintiff then sold back the same asset to the 1st defendant at RM16,087,500 ("sale price") the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ("asset sale agreement (4)"). Afterward, by another letter of hibah dated 24 April 2009, the 1st defendant conveyed, by way of gift to the 2nd defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2D in encl. 15.

[21] What is obvious in the above said arrangements is that it is not the intention of the parties to own the asset but to have liquidity available for the purpose of refinancing the 1st BBA Facility. It looks like a hiyal or legal stratagems to circumvent the prohibition of riba by way of sale. Hence, one might say that the sale is fictitious.

[22] This court has emphasized in the previous paragraphs that BBA is a sale contract in which the payment of the price is deferred. It can be implicated in any type of sale except salam contract. In this present case, the nature of transaction embarked into by the parties is called al-Inah or bai al-inah.

[23] Al-'Inah or Bai' Inah conceptually refers to a sale of an asset, which is later repurchased at a different price, whereby the deferred price is higher than the cash price. It aims to obtain liquidity or cash money. The theory and application of this concept are still regarded as a matter of juristic disagreement amongst the Shariah scholars because it resembles a hilah. However, if hilah is regarded as a mode to solve problems (makhraj) that is much needed by the people, the transaction is acceptable (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, pp. 66-70).

[24] Following the Shafi'i school of Islamic law who legalized and validated 'Inah transactions, the Shariah Advisory Council of Bank Negara Malaysia ("SAC") had officially endorsed bai' al 'inah transaction in their legal rulings and resolutions. One of the arguments raised to support their adoption of the Shafi'is view is public interest consideration (maslahah) ie, to overcome the problem of liquidity shortage in the country without having to resort to conventional riba-based borrowing. The legalization of bai' inah may also be said to be in line with the legal maxim on the lesser of two evils (akhaf al dararain) (see Associate Professor, Dr Engku Rabiah in her article *"Bay Al-Inah and Tawarruq* (see Essential Reading In Islamic Finance", [2008], CERT Publication at p. 136 and *Majlis Amanah Rakyat v. Bass Bin Lai* [2009] 2 CLJ 433).

[25] In the light of the above and in the absence of any legal factor that could vitiate a contract, this court has no reason but to uphold the transactions and contracts entered by both parties and the allegation by the defendants that the plaintiff failed to disburse the monies under the BBA Facility is without merit.

[26] It is wrong for learned counsel for the defendants to employ the word "loan" when referring to the transactions between the parties throughout his submissions. This is because, in Islamic finance, the only loan recognized is qardh or qardh hasan. Qardh means loan contract between two parties in which repayment of the loaned amount must be of the same value without additional return (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, p. 34). It does not involve any underlying subject matter to be exchanged between the parties. On contrary, in this case, it is a sale based transaction where there is underlying subject matter.

[27] The so called resolution no: 96 relied by learned counsel for the defendants is entirely misconceived in respect of its use. The statement quoted by the counsel is actually part of the resolution made by the SAC in its 32nd meeting on 27 February 2003/25th Zulhijjah 1423. Therefore, it could not be identified as resolution no: 96. The resolution has been passed to permit ibra' in a variable rate BBA product which has no relevancy to our present case as the rate involves is a fixed rate. Furthermore, the BBA Facility before this court is not for rescheduling but for refinancing the 1st BBA Facility. For ease reference, the said resolution is reproduced herein:

Resolution

95. The Council in its 32nd meeting on 27th February 2003/ 25th Zulhijjah 1423 resolved that granting of ibra' in a variable rate bai' bithaman ajil product is permissible. In this context, the bank is the party who offered the ibra' (unilaterally promise to give ibra') to the customers and the bank may decide to give ibra' in any manner it feels appropriate. If the bank has promised (binding promise) to give ibra' to its customers, the bank bound to fulfil its promise.

96. Based on the mutual agreement in the contract, the financing period for the customer can be extended without the need to execute fresh contract provided that both parties fulfill all conditions in the agreement and the final price charged on the customers shall not exceed the original selling price (based on the ceiling profit rate) contracted earlier.

[28] Apart from the above said arguments, learned counsel for the defendants also claimed that there was uncertainty in respect of the terms and conditions under the 1st BBA Facility because the relevant asset purchase and asset sale agreements were never perfected by both parties.

[29] Wish respect, it is my considered view that the issue has no relevancy and it carries no weight. My reasons are as follows:

(a) the transactions taken place between the parties are sale based transactions, be it under the 1st BBA facility or the one under the present claim. There are two separate and different agreements involved;

(b) the claim brought by the plaintiff against the defendants does not arise from the 1st BBA Facility but from the subsequent BBA Facility granted to them;

(c) furthermore, the fact that the facility amount of RM50,000,000 under the 1st BBA Facility was duly disbursed by the plaintiff as evidenced in letter of disbursement dated 28 August 2008 exhibited and marked as 'CIMB-7A in encl. 25 was never disputed by the defendants; and

(d) there is no proof furnished by the defendants that could lead to the existence of al bai' 'ala albai' which is a sale over the sale of another person. In this type of transaction, there must

A be a 3rd party attempts to sell his product while the sale deal is in the process of being concluded between two persons. The intention of the 3rd person is to upset the bargain.

The Correctness Of The Amount Claimed

B **[30]** I shall now deal with the next issue which concerns the correctness of the amount claimed. According to the defendants, the plaintiff's solicitors by a letter dated 12 April 2010 ("1st NOD") demanded of the 1st defendant the sum of RM43,773,586.92 as at 9 April 2010. Subsequently, in another C letter dated 20 May 2010 ("2nd NOD"), the same firm made a demand for RM54,442,744.08 as at 18 May 2010. This, according to learned counsel for the defendants tantamount to gharar or uncertainty.

D **[31]** This court is unable to agree with the above said arguments even if indeed there had been the gharar as alleged. In *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157, Shaik Daud Ismail JCA (as he then was) had this to say:

E > For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a F demand is for the purpose of bringing home the debtor that the creditor is demanding its money.

[32] It is settled that the law applicable in the BBA contract is no different from the law that is applicable in a conventional loan G agreement (see *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625 and *Bank Islam Malaysia Bhd v. Lim Kok Hoe*, *supra*)

[33] On contrary, in this case, the plaintiff did specify the precise amount owing. Although there was the 1st NOD issued before H hand, it was clear from the 2nd NOD that the plaintiff had duly requested the defendants to disregard the first one in order to avoid misunderstanding or confusion. Therefore, I could not see how this situation could be prejudicial to the defendants. Even if there had still have confusion and uncertainty, the defendants, I who wish to know the exact and precise amount, could have asked the plaintiff what sum they are expecting to be paid and not be waiting until this case came up before this court where the same could be raised at the first available opportunity.

[34] The amount claimed in this application is RM54,442,744.08 as at 18 May 2010. The plaintiff has furnished two documentary proofs ie, the statement of account and the certificate of indebtedness to substantiate the said claim. It is a settled law that this court should give effect to such documents which have been agreed by the parties to be conclusive evidence on defendants' indebtedness under the 2nd BBA Facility. Since there was no evidence to the contrary before this court to cast doubt on the accuracy of the certificate, this court ruled that the issue raised is with no merit. The legal position of the certificate of indebtedness is well settled in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544.

Ibra'

[35] The next issue put forth by the defendants is on their entitlement to ibra'. On this issue, learned counsel for the defendants argued that they are entitled to ibra' because the BBA Facility was terminated by the plaintiff before the expiry of its tenure and this was considered as an early settlement.

[36] There are many definitions of ibra'. Among the literal meanings of al-ibra' are elimination, release, acquittal and removal of something. According to Ibn al-'Arabi, bari' means to release, eliminate or purify and to remove or inter distance (see Dr Abd al-Rahman Salih al-Atram, *Ibra' In Islamic Finance: Adaptation And Application, Contemporary Issues in Islamic Finance*: Deliberation at the International Shariah Scholars Dialogue 2006, Central Bank of Malaysia, at p. 294). In technical term, it means surrendering one's right of claim over debt either partially or in full (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, p. 40 and *Resolusi Syariah Dalam Kewangan Islam*, 2010, p. 123).

[37] The SAC in its 95th meeting held on 28 January 2010 had decided that in line with the need to safeguard maslahah (public interest) and to ensure justice to the financiers and customers, Islamic banking institutions are obliged to grant ibra' to customers for early settlement of financing based on buy and sell contracts (such as bai' bithaman ajil or murabahah). In order to eliminate uncertainties pertaining to customers' rights in receiving ibra' from Islamic banking institutions, the granting of ibra' must be included as a clause in the legal documentation of the financing. The determination of ibra' formula will be standardised by Bank Negara Malaysia (see Resolutions of Shariah Advisory Council of Bank

Negara Malaysia on *Ta'widh, Ibra* and Late Payment Charge, Islamic Banking and Takaful Department, BNM/RH/NT 008-8, at p. 2). The effective date of this resolution is 7 June 2010.

[38] This resolution was made pursuant to the several issues on ibra' rose at the court of law particularly at Kuala Lumpur High Court and the inconsistency of practices amongst the Islamic Banks in imposing ibra' amount (see Prof Madya Dr Asyraf Wajdi Dusuki & Ors, *Implimentasi Ibra' Dalam Produk Berasaskan Harga Tangguh Dalam Sistem Perbankan Islam: Analisis Dari Perspektif Operasi Perbankan Dan Maqasid Syariah*, ISRA Research Paper (No. 16/2010), at pp. 1-3).

[39] Before this, in its 24th meeting held on 24 April 2002, SAC resolved that Islamic banking institutions may incorporate the clause on undertaking to provide ibra' to customers who make early settlement in the Islamic financing agreement and with the inclusion of ibra' clause, the bank is bound to honour that promise. This resolution is made pursuant to the practice of the bank giving rebate solely on their discretion which caused confusion amongst the customer whether they are eligible to receive ibra' when they make early settlement (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, p. 41).

[40] The crucial word here is "an early settlement". Do these words include the early termination by the plaintiff upon default on the part of the defendants?

[41] In this case, the relationship between the plaintiff and the 1st defendant is regulated by the terms and conditions they agreed upon as become apparent in the letter of offer dated 17 April 2009 and the asset purchase and asset sale agreements mentioned in para. 19.

[42] On that basis, this court finds that in paras. 21 and 22 of the letter of offer, it was agreed that the 1st defendant shall be given the right to make early settlement on the BBA Facility and the plaintiff shall be entitled to grant ibra' and the plaintiff's calculation of ibra' shall be final and binding. It was further agreed that for entitlement of ibra' on early settlement basis of the selling price, the 1st defendant is required to give three days advance notice to the plaintiff, which early settlement must be made on a profit payment date. However, should the notice is less than three days, the plaintiff shall be entitled to grant a lower ibra'.

[43] On the plain reading of the said letter, the early settlement only refers to a situation when the 1st defendant makes early payment of the BBA Facility before the end of the tenure without compulsion. Unfortunately, it was not the defendants' case as until to date, there is still no effort to settle the outstanding.

[44] For the foregoing reasons, the defendants' contention must fail. The plaintiff is under no obligation neither duty to grant an ibra' to the defendants.

Ta'widh

[45] For the purpose of this application, the plaintiff initially claimed ta'widh at 1% per annum on overdue installments and shall continue to be levied cumulatively on installments falling into arrears until 30 November 2011 and upon maturity of the BBA Facility, late payment charges at the prevailing Islamic Interbank Money Market Rate on the outstanding purchase price until full settlement. This item was challenged by the defendants on the ground that the compensation calculated by the plaintiff is on compounded basis which is against the agreements.

[46] However, the same has been corrected where it has been averred by the plaintiff that the correct one is at 1% per annum on the outstanding amount until 30 November 2011 (maturity date of facility) and at the then prevailing Islamic Interbank Money Market until full settlement. This error, according to the plaintiff, would not give effect to the amount claimed by the plaintiff because there is no ta'widh imposed as evidenced in the statement of account.

[47] Al-Ta'wid (compensation) is to cover the loss that has happened due to transgression or negligence or offence. Literally it means substitute, counter value. Technically it is to pay what is required of a financial counter-value because of inflicting losses on others. The Fiqh Academy Journal defines al-ta'wid as payment of financial compensation or counter-value, which is obligatory as a result of loss caused to others (see Dr 'Ali Muhyi al-Din al-Qurah Daghi, *The Problem of Delayed Debts And Their Guarantees in Islamic Banks: A Shariah Study On Compensation For Deferred Loans, Contemporary Issues in Islamic Finance*: Deliberation at the International Shariah Scholars Dialogue 2006, Central Bank of Malaysia, at p. 130). The SAC defines ta'widh as giving compensation on losses incurred resulting from harmful incidences (see Shariah Resolutions in Islamic Finance, Bank Negara Malaysia, 2007, p. 88).

[48] The imposition of ta'widh is essential. In its 95th meeting on 28 January 2010, SAC had this to say:

> As a deterrent mechanism against cases of default by customers in discharging their financial obligation arising from Islamic contracts, the imposition of late payment charge by Islamic banking institutions that comprises both concepts of gharamah (fine or penalty) and ta'widh (compensation) is allowable.

[49] It is undisputed that the plaintiff has the right to impose the ta'widh on the defendants on the above said circumstances. However, the challenge raised on this issue revolves around the amount that the plaintiff is entitled for.

[50] In its 4th meeting, held on 14 February 1998/16th Syawal 1418, the SAC has resolved that ta'widh may be imposed on the defaulting customer who fails to meet his obligation to pay the financing based on the following conditions:

(i) the amount of ta'widh cannot exceed the actual loss suffered by the financier;

(ii) the determination of compensation is made by a third party, which is Bank Negara Malaysia; and

(iii) the default or delay of payment is due to negligence on the part of the customer.

[51] Pursuant to the above said resolution, it was agreed by parties that the 1st defendant has to pay the plaintiff compensation on overdue installments and payments of the selling price as follows:

(i) for failure to pay any installments of the facility from the date of first disbursement until the date of maturity of the facility, the compensation rate that shall be applied is 1% per annum on the overdue amount or any other method approved by Bank Negara Malaysia;

(ii) for failure to pay any installments and which failure continues beyond the maturity date of the facility, the compensation rate shall be applied is the bank's current Islamic Interbank Money Market Rate on the principal balance or any other method approved by Bank Negara Malaysia; and

(iii) the amount of such compensation shall not be compounded on the overdue amount and/or principal balance as the case may be,

(see paras. 22(i) - (iii) of the letter of offer).

[52] In the light of the above, this court has no hesitation to uphold what have been agreed by the parties in respect on ta'widh that the rate of ta'widh must be in accordance with para. 22(i)-(iii) of the letter of offer and nothing diverse to it.

Cause Of Action Against The 2nd Defendant

[53] I shall now deal with the last issue which concerns on the liability of the 2nd defendant under the BBA Facility.

[54] According to learned counsel for the defendants, the 2nd defendant is not a guarantor and/or principal debtor to pay the outstanding balance under the BBA Facility. He merely guaranteed up to the shares charged in the MOD.

[55] Regarding this, this court refers to cl. 6.1 of the MOD. The provision reads:

> Upon the happening of any Event of Default, you may without any notice to us or the Customer realize, sell or dispose of the Securities or any part thereof ... in such other manner for such consideration (whether payable or deliverable immediately or by installments) as you may think fit without being in any way responsible for any loss occasioned thereby however arising ... **In the event of any deficiency after the sale of the Securities subject hereto whatsoever and howsoever arising we agree to make good and pay on demand to you such deficiency** ... (Emphasis added)

[56] By virtue of the above said provision, it is clear that the plaintiff has a right to claim the outstanding amount from the 2nd defendant as the chargor. In this case, the 2nd defendant is the director of the 1st defendant's company. He is learned enough to peruse and read the MOD before signing it. Once executed is deemed binding upon him unless he could prove that there is a vitiating factor such as duress and misrepresentation involved which is not the case in the present application.

A **Conclusion**

[57] In this case, the parties have voluntarily agreed to be bound by the terms and conditions of specific agreements as mentioned before. They have also agreed to be bound by some mechanism
B and process to give effect to the ultimate intention of the parties ie, to refinance the 1st BBA Facility.

[58] His Lordship Visu Sinnadurai J in *Polygram Records Sdn Bhd v. Hillary Ang & Ors & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ observed at p. 147 as follows:
C

> The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. This rule is so strict that
D even if a party to a contract has not read the contents of a contract, he is held to be bound by its terms. In the leading case of *L'Estrange v. F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p. 404):
>
> > When a document containing contractual terms is signed,
> E then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[59] The same position also applies to Islamic transactions. Shariah orders that obligations and contracts be fulfilled:
F

(i) "O ye who believe! Fulfil all obligations". (Surah al-Maidah, 5.1);

(ii) "And fulfil (every) obligation, for [every] obligation will be
G inquired into [on the day of Reckoning]" (Al-Isra', 17.34);

(iii) "Muslim are bound by their conditions" (Al-Bukhari, Sahih, vol. XIII "Kitab al-shurut", al-Mat ba'ah al Masriyah, 1934, p. 289).

H **[60]** In this instant case, the court is satisfied that there is no real prospect for the defendants successfully defending the claim by the plaintiff. *Halsbury's Laws of Malaysia*, vol. 1, Civil Procedure, at p. 62 states:

I > The underlying philosophy of the Order 14 procedure is to prevent the Plaintiff clearly entitled to his money from being delayed in obtaining his judgment where there is no fairly arguable defence to the claim and the procedure enables the Plaintiff to obtain a final judgment without a trial.

[61] In *John Wallingford v. The Directors & C of The Mutual Society* [1880] 5 AC 685 (HL) at 699 - 700, Lord Haltherley referred to the object of summary judgment procedure as follows:

> I apprehend that from the first objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end or which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be hard to an immediate judgment and to an immediate execution.

[62] In the above circumstances, I therefore allowed the plaintiff's application with costs.